



POST-INQUEST CIVIL CLAIMS: ISSUES AND TACTICS

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Introduction – aim of this training

- Give an overview of the type of civil claims arising from inquests.
- Spotting and developing civil claims early in the inquest process.
- Look at key case law and main themes.
- Consider tactical approaches to maximise damages.
- Common defendant challenges and how to overcome them.
- Look at problems that arise in funding claims.



Civil claims arising from inquests

- Human Rights Act 1998
- Negligence (Law Reform (Miscellaneous Provisions) Act 1934 ('LR(MP)A'))
- Claims under the Fatal Accidents Act 1976
- Psychiatric Injury as secondary victim



Human Rights Act 1998 – Articles 2, 3 & 8 ECHR

- Common claims; shared themes; why a relative dearth of authorities creates problems (but also opportunity)
- Brought by family members as “victims” under s.7 HRA 1998 (and by the Estate via LR(MP)A)
- Article 2 ECHR.
- Article 3 ECHR.
- Article 8 ECHR.
- Early advice on merits is usually possible but much can depend on i) disclosure ii) the inquest itself iii) expert evidence.



Limitation period and protective lodging

- **If you take a client on before expiry of limitation:** (i) obtain letters of administration; (ii) ideally lodge protectively for all Claimants against all potential Defendants and agree to extend time for service of claim form (or just the Particulars of Claim, if Defendant refuses to agree extension for both); (iii) if it isn't possible to lodge protectively for any/all Claimants, obtain written agreements from all potential defendants that they will not rely on a limitation defence if the claim is brought before a particular date (which may be extended).
- **If limitation has expired:** (i) s.7(5)(b); “such longer period as the court or tribunal considers equitable having regard to all the circumstances” – nb. unhelpful case of *P v Tameside MBC* [2017] EWHC 65 (QB).



Article 2 ECHR claims

- Death in custody; death in the community; death following police contact
- **The “looser” test for causation** is unique in civil law/liability. “‘But for’ causation is not required to establish a violation of Article 2 ECHR. Rather, causation is satisfied by matters which had a ‘substantial chance’ or a ‘real prospect’ of altering the outcome (Savage [2010] (QB), at [82], [89]), or measures which *‘judged reasonably, might have been expected to avoid that risk’* (Opuz v Turkey [2010] 50 EHRR 28, Grand Chamber, at [136]).
- Per para 82 of Savage in the High Court: “*the claimant does not have to show that had the trust acted appropriately there would probably have been no death, but merely that she has ‘lost a substantial chance of this’* – Van Colle, per Lord Brown of Eaton-under Heywood at paragraph 138.”

Article 2 ECHR claims

- Damages for victims in Article 2 ECHR claims fairly stable/predictable over time: **£10,000-£20,000**. Allow for (justified) variation between family members when claims settle on global figure.
- Non-pecuniary damage can be even higher: €30,000 in *Semache v France*, 36083/16 – a police custody Article 2.
- See also: *D & V v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB).
- Consider whether family members response to bereavement may have resulted in a diagnosable psychiatric injury. Have they consulted a medical professional?

Articles 3 & 8 ECHR claims

- Consider what, if anything, Article 3 might add to the claims by victims in their own right – is the threshold for Article 3 severity met?
- Will claims for a breach of Article 8 add anything to the claims by victims in their own right?
- Remember that Estate can claim as victim too (consider role of Article 3 in the period leading up to death).



“Dependency damages” via the FAA 1976

- Brought by “Dependants” – bespoke definition at s.1(3)
- Section 1(1) FAA: “If death is caused **by any wrongful act, neglect or default** which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.”
- Section 2: “... Every such action shall be for the benefit of the dependants of the person (“the deceased”) whose death has been so caused”



“Dependency damages” via the FAA 1976

- What can be claimed via this route? Anything reasonable expected which arose as a result of the family relationship and would have continued after death.
- **Future earnings** on which the dependent would have relied; pecuniary and non-pecuniary loss. Evidence: past employment, earnings and likely future trajectory... A reasonable expectation of pecuniary benefit must be shown, which is lower than the balance of probabilities but is more than a speculative possibility: *Davies v Taylor* [1974] AC 207. The “pecuniary benefit” relied upon by a dependant can include gratuitous services, such as a spouse’s services in the home or the loss to a child of a deceased’s parents daily care on their behalf: *Regan v Williamson* [1976] 1 WLR 305; *Spittle v Bunney* [1988] 1 WLR 487.



“Dependency damages” via the FAA 1976

- If the FAA doesn’t offer a route to “dependency damages”, for whatever reason, those losses may or may not be attainable via the HRA (you would need to persuade the court that it is necessary to award those particular damages to afford “just satisfaction”).
- **Funeral expenses** – s.3(5) FAA;
- “Bereavement Award” of £15,120 (s.1A – to benefit wife, husband or civil partner of the Deceased; or, if the Deceased is a child, to parents). Now, following *Smith v Lancashire Teaching Hospitals NHS FT & Ors* [2017] to include cohabitantes.



“Dependency damages” via the FAA 1976

- The court has permitted claims for ‘**loss of love and affection**’, where the services previously provided by the deceased were over and above those that could be provided by any housekeeper or nanny (*Regan v Williamson*). Claimants are generally awarded between £1,000 and £3,000 for loss of love and affection, but also up to £5,000 approx. (*Manning v King’s College Hospital NHS Trust*).
 - **Loss of a partner:** *Topp v. London Country Bus [1992] PIQR P206.*
 - **Loss of a parent:** *Regan v. Williamson 1976 2 ALL ER; 241 & Manning v King’s College Hospital NHS Trust [2008] EWHC 3008 (QB)*



“Dependency damages” via the FAA 1976

- BUT: the FAA route requires that identify your cause of action (negligence, clinical negligence, assault, battery etc) AND satisfy “but for” causation.
- There will be claims where the same facts give rise to an Article 2 claim and also a tort, on “but for” causation”;
- But many do not. That has implications for merits, quantum and settlement negotiations.



Claims by the Estate via LR(MP)A 1934

- The deceased suffered injury and death – how is that recompensed *on their behalf*?
- Via the Estate. The Act preserves any claim the injured person had on their death on behalf of their Estate (it also preserves claims that could have been made against the deceased against the estate).
- Typical claims made under LR(MP)A where the claim relates to the death are negligence and assault and battery.



Claims by the Estate via LR(MP)A 1934

- A negligence claim via the Estate opens the door to damages for **Pain Suffering and Loss of Amenity** (PSLA): in our cases, think of period of vulnerability while in prison or mental health detention immediately prior to, for example, an act of fatal self-harm. Is there medical evidence in support of PSLA? Also consider the period between the act which causes death and the death itself e.g. PSLA will be greater in a self-inflicted death where the person has a period of consciousness in hospital for several days/weeks prior to death than in a police shooting where the period between the deceased experiencing the shock of seeing a police officer with a gun and being shot and dying is a matter of seconds.



Claims by the Estate via LR(MP)A 1934

- “**Special damages**” – loss of earnings (injury to death), care, medical expenses, funeral
- NB. No recovery of damages for loss of income after death because regime does not permit “double recovery” under both this route and the dependency damage route (so you use the latter).
- Exemplary damages cannot be claimed.
- Again, consider claims whose facts may well establish Article 2 with good merit but do not satisfy “but for” causation in a negligence claim.



Psychiatric Injury as secondary victim

- *Alcock v Chief Constable of South Yorkshire Police, (Hillsborough disaster)*:
 - Primary victims -those directly involved in sufficiently shocking (usually life threatening) situations.
 - Secondary victims- those not directly threatened, often close family members of those injured or killed.
- To qualify as a secondary victim a claimant must: (1) have a relationship of love and affection with the primary victim; (2) come across the ‘immediate aftermath’ of the event; (3) have direct perception of the harm to the primary victim; and (4) be of reasonable fortitude. These claims are notoriously difficult to succeed.



Choosing your Defendant

- When there is more than one “public authority” involved in the alleged breach, eg. MoJ (prison) and a Trust (healthcare) – the statutory scheme is designed to ensure accountability and avoid confusion.
- Often a tactical advantage to take an expansive approach to potential D’s where the merits justify it.
- Whether you pick one or more than one, let the D’s argue among themselves if they are contending “shared liability”.
- If merits against one or more D’s is later reassessed as negative, depending on how advanced the claims are, it is usually possible to agree a drop hands settlement



Typical Defendant strategies

- Challenging “victim” status for some family members, eg. adult siblings (but then often drop the issue later...) D might ask to see birth certificates as proof of parentage. Does a birth certificate contain the name of the father in question? If not, can witness statements be obtained to confirm parentage?
- The outcome of the inquest is not determinative of merits of civil claim – but it does affect the likelihood of a D settling early and how “brave” they feel.
- Coroner may have closed an avenue down that the civil claim can still open up. Alternatively, the inquest could have gone far better than anticipated but a judge in civil proceedings would be unlikely to reach the same conclusion. Expect Counsel to have a feel for these issues.

Typical Defendant Strategies

- **Defendants sometimes try seek to resist damages in principle for financial loss via the HRA** – this is wrong in law - we can and should dig in: see *Ogur v Turkey* (Application No. 21594/93); *Bektas v Turkey* (2010); *Rantsev v Cyprus & Turkey* (Application No.25965/04; *Fernandes v Chief Constable Essex Police*, Central London County Court (July 2019): Judge applies “proximity and foreseeability” to HRA damages - and instructive case on what happens if the evidence isn’t good enough at trial.
- In summary: “Just satisfaction” can and should require recompense for “pecuniary damage” (ranging from future loss of income from employment of deceased to the costs of bereavement counselling after the death). This route to damages is even more important if you don’t also have a negligence claim/other route to damages for financial loss other than via the HRA.



Typical Defendant Strategies

- In dependency claims, D will often seek to attack the Schedule of Loss:
 - **Low life expectancy and/or capacity to work/carry out activities** –self-harm history in the community, drugs and alcohol abuse, heart condition, obesity etc
 - Often some compromise will have to be factored into quantum, but expert evidence addressing life expectancy and/or capacity to work can protect against this.
 - **Deceased either had or was facing a long custodial sentence.**
 - **No employment history.** One tactic is to claim the flat rate of child maintenance for someone who is on benefits
 - **Unstable relationship** – Obtain and inspect any DWP, mental health, social services and GP records.

Optimising for settlement

- How best to push for settlement post-inquest but pre-Particulars of Claim in “straight Article 2 claims”...
- NB. Very few Article 2 claims go to trial so tactics often play a larger role than narrow “legal” arguments. There is an embedded understanding by Defendants on what has merit and what doesn’t.
- Consider how letters of claim, representations, framing of the inquest evidence, disclosure requests, Schedules, Offers can change the dynamic between the parties



Funding issues

- Legal aid; children (litigation friends and infant approval hearings); adults lacking in capacity (litigation friends and approval hearings for protected parties);
- Costs Budgeting – courts can dis-apply; CPR 3.12 (1)(c) and/or under CPR 3.12 (1) (e).
- CFAs; ATE;
- Qualified One-way Costs Shifting” on a pure Article 2 claim? The uncertain landscape on protection to “mixed claims: *Brown v Commissioner of Police of the Metropolis [2019] EWCA Civ 1724*



Case study (1) Self-inflicted death in prison

- Self-inflicted death in HMP Winchester. 21 years old. On healthcare wing.
- On a defective ACCT – but more importantly, doctors missed psychosis and failure to treat
- Jury found prison staff failures, healthcare failures and “neglect”
- Clinical negligence and Article 2 claims brought against Trust providing h/c in prison. Article 3 ECHR claim on behalf of Estate. PSLA. Trust initially admit liability for negligence but not Article 2. Position shifted. Global settlement reached for Estate, mother and sister: **£60,000**. Infant approval hearing for minor sibling’s Article 2 damages (£15,000).



Case study (2) Self-inflicted death in community

- Deceased was under treatment in community by a Home Treatment Team. History of psychiatric detention. Clear diagnosis of schizophrenia. Flawed risk assessments and inadequate care. Coroner found Article 2 to be engaged (after a legal fight...).
- Coroner concluded that the death ‘was contributed to by a failure of the mental health services to fully assess his mental state, to fully assess his risk of suicide (by gathering, considering and sharing key clinical information) and to put in place and carry out robust management plans to address the risk.’
- Claim by mother. She discovered her son shortly after the act of self-harm.



Case study (2) Self-inflicted death in community

- Estate claim: £20,000 (HRA and PSLA)
- Mother's HRA claim as victim: £15,000
- Bereavement counselling: £1000
- Funeral costs: £3000
- Past loss of services: £3000
- Future loss of services: £40,000

- Total: £82,000. Settled at £50,000.



Case study (3) Death in psychiatric hospital

- The deceased was found in his room. Cause of death: “inhalation of gastric contents”.
- Timing and trigger remained speculative. Two expert reports.
- But inquest evidence established that staff did not carry out fifteen minute checks.
- Coroner found that “lack of observations *possibly* contributed to the death”.
- Civil claim brought by wife in her own name and as Estate. Article 2 ECHR, Article 3 ECHR, negligence.
- Deceased had been in full-time employment prior to mental health deterioration. Good prospect of returning to work and supporting family. Significant future loss of earnings.
- Part 36 offer of **£300,000** accepted. Ambitious schedule of loss. Why did Defendant settle?



Case study (4) Restraint death in Custody

- Deceased died under restraint by prison officers whilst in custody, observed by healthcare nurse.
- Claim brought by Family against MOJ and Healthcare Trust under HRA and FAA,
- Significant Limitation Issues: HRA claims statute barred under Section 7 (5) (a), having been issued **two years** out of time, despite specialist solicitors being instructed for the inquest within a year of death.
- No Estate claim: No grant of probate.
- Assessed value £60,835.
- Settled at £50,000 (£10,000 each C under HRA, and £10,000 under FAA).
- Weaker claim against Healthcare Trust (nurse monitoring restraint) discontinued with drop-hands agreement following settlement with MOJ.



Case study (5) Self-inflicted death in prison

- Deceased vulnerable with mental health issues. Discovered hanging in cell.
- Claims under HRA, 'LR(MP)A' and FAA for loss of earnings.
- The First Defendant, The MOJ, denied liability and quantum. The Second Defendant, Healthcare Trust, had admitted liability and causation, but quantum remained in dispute going into the Joint Settlement Meeting.
- Particularly interesting as Claimants maximised losses in Schedule by claiming loss of earnings as a proxy for the value of lost care services in relation to the FAA claim.
- Following the Joint Settlement Meeting, the parties agreed settlement of £275,000, plus the costs of the inquest and the costs of the civil action.



Case study (6) Restraint Death in Custody

- Deceased died under restraint by police officers. Claim brought by unmarried partner against police.
- Limitation Issues: HRA claims statute barred having been issued nine months outside the primary one year limitation period (Sols had not been instructed until then).
- Victim Status issues – Police relied upon statements and hospital records where witnesses claimed the couple had separated and C described deceased as a ‘flatmate’.
- C exposed to cost risk: CFA without ATE insurance.
- C intimated but decided against pursuing a claim for psychiatric Injury as secondary victim. Alcock test for secondary victims unlikely to be met and Causation issues (medical records showed a lengthy history of depression and anxiety prior to partner’s death)
- Settlement: £17,500.



Thank you

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